Rmarine Engineering (M) Sdn Bhd v Bank Islam Malaysia Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO 24NCC(ARB)-44–11 OF 2011
HASNAH MOHAMMED HASHIM J
19 JULY 2012

Arbitration — Agreement — Jurisdiction of court — Arbitration award final, binding and conclusive — Reconsideration of Arbitral Tribunal — Whether there was serious failure to analyse and appraise material and relevant evidence — Whether exceptional circumstance

Contract — Guarantee — Banker's guarantee — Default of payment by principal — No restriction or condition or proof of any default by principal — No objection by principal — Whether amount guaranteed in on-demand performance guarantee payable upon written demand — Applicability of ss 77 or 79 of the Contracts Act 1950 in on-demand performance guarantees — Guarantor's liability — Whether on-demand performance guarantee arises upon first demand or upon proof of default by principal

The plaintiff provided specialised off-shore services to the oil and gas industry and the defendant, a financial institution, was appointed as the guarantor in a subcontract between the plaintiff and Intraline Resources Sdn Bhd ('Intraline'). The events unfolded when the plaintiff issued a tax invoice to Intraline for payment, of which the latter defaulted. Through a 14 days' notice, the plaintiff demanded payment from the defendant. However, the defendant refused to make any payment. Since the guarantee was an on-demand guarantee, it was contended that the defendant, as a guarantor, was therefore liable to make the payment together with interest. The matter was then brought for arbitration where the Arbitral Tribunal dismissed the plaintiff's claim and awarded costs to the defendant. Dissatisfied, the plaintiffs proceeded to file the present application, contending that the Arbitral Tribunal had committed errors of law. The issues for the court's determination were whether the amount guaranteed in an on-demand performance guarantee was payable upon a written demand without restriction or condition or proof of any default by the principal and notwithstanding any objection by the principal; whether ss 77 or 79 of the Contracts Act 1950 applied to ondemand performance guarantees; and whether a guarantor's liability for an on-demand performance guarantee arose upon the first demand on the guarantor or only upon proof of default by the principal.

Held, dismissing encl 1 with costs:

(1) An arbitration award is final, binding and conclusive and can only be

challenged in exceptional circumstances. The High Court had a limited jurisdiction to intervene. Lack of appraisal of the law and the evidence were not, per se, a good ground to vary, for reconsideration by the Arbitral Tribunal. There must be a serious failure to analyse and appraise material and relevant evidence. This limited jurisdiction should only be exercised in exceptional circumstances and should be confined to arbitral errors and not appellate errors (see paras 15, 18 & 41).

(2) The Arbitral Tribunal had correctly applied legal principles relating to an on-demand guarantee based on case laws and construction of the wordings of the relevant clauses in the bank guarantee. This was a finding of fact based on evidence before the Arbitral Tribunal and the court should not interfere on grounds it would had come to a different conclusion. There was no error on the face of the award (see para 40).

(3) The finding of the Arbitral Tribunal of the application s 79 of the Contracts Act 1950 was consistent and not in contradiction with the evidence presented. Furthermore the misapplication of law, if at all, or favoring one version to another was not an error on the face of the award (see para 37).

(4) The Arbitral Tribunal had deliberated and decided based on the contemporaneous documents evidence before them that the guarantee was an irrevocable demand guarantee. The Tribunal had examined the words of the guarantee in question (see para 38).

[English summary

Plaintif telah memberi perkhidmatan pakar di luar pesisir kepada industri minyak dan gas dan defendan, institusi kewangan, telah dilantik sebagai penjamin dalam subkontrak antara plaintif dan Intraline Resources Sdn Bhd ('Intraline'). Kejadian terbongkar apabila plaintif mengeluarkan invois cukai kepada Intraline untuk bayaran, yang mana gagal dibuat oleh Intraline. Melalui notis 14 hari, plaintif telah menuntut bayaran daripada defendan. Walau bagaimanapun, defendan enggan membuat apa-apa bayaran. Oleh kerana jaminan itu merupakan jaminan atas tuntutan, adalah dihujahkan bahawa defendan, sebagai penjamin, dengan itu bertanggungjawab untuk membuat bayaran berserta faedah. Perkara tersebut kemudian dibawa kepada penimbang tara di mana Tribunal Timbang Tara telah menolak tuntutan plaintif dan mengawardkan kos kepada defendan. Berasa tidak puas hati, plaintif-plaintif meneruskan dengan memfailkan permohonan ini, dengan berhujah bahawa Tribunal Timbang Tara telah melakukan kesilapan undang-undang. Isu-isu untuk ditentukan mahkamah adalah sama ada jumlah yang diberi jaminan dalam jaminan pelaksanaan atas tuntutan perlu dibayar berdasarkan tuntutan bertulis tanpa sekatan atau syarat atau bukti apa-apa kegagalan oleh prinsipal dan meskipun terdapat apa-apa bantahan oleh prinsipal; sama ada ss 77 atau 79 Akta Kontrak 1950 terpakai kepada jaminan

pelaksanaan atas tuntutan; dan sama ada liabiliti penjamin untuk jaminan pelaksanaan atas tuntutan wujud selepas tuntutan pertama ke atas penjamin atau hanya selepas bukti kegagalan oleh prinsipal.

Diputuskan, menolak lampiran 1 dengan kos:

(1) Award timbang tara adalah muktamad, mengikat dan konklusif dan hanya boleh dicabar dalam keadaan tertentu. Mahkamah Tinggi mempunyai bidang kuasa terhad untuk campur tangan. Kurang penelitian undang-undang dan keterangan bukan, per se, alasan kukuh untuk mengubah, untuk pertimbangan semula oleh Tribunal Timbang Tara. Perlu wujud kegagalan serius untuk menganalisa dan meneliti keterangan material dan relevan. Bidang kuasa terhad ini hanya dilaksanakan dalam keadaan tertentu dan patut dihadkan kepada kesilapan timbang tara dan bukan kesilapan rayuan (lihat perenggan 15, 18 & 41).

(2) Tribunal Timbang Tara telah dengan betul menggunapakai prinsip-prinsip perundangan berkaitan jaminan atas tuntutan berdasarkan kes-kes perundangan dan pembentukan ayat untuk fasal-fasal berkaitan dalam gerenti bank tersebut. Penemuan fakta ini adalah berdasarkan keterangan di hadapan Tribunal Timbang Tara dan mahkamah tidak patut campur tangan atas alasan ia mungkin akan tiba kepada kesimpulan yang berbeza. Tiada kesilapan pada award tersebut (lihat perenggan 40).

(3) Penemuan Tribunal Timbang Tara terhadap pemakaian s 79 Akta Kontrak 1950 adalah konsisten dan tidak bercanggah dengan keterangan yang dikemukakan. Tambahan pula pemakaian salah undang-undang, jika adapun, atau menyebelahi satu versi daripada yang satu lagi bukanlah kesilapan pada award tersebut (lihat perenggan 37).

(4) Tribunal Timbang Tara telah membuat pertimbangan dan keputusan berdasarkan dokumen-dokumen keterangan sedia ada di hadapan mereka bahawa jaminan tersebut adalah jaminan tuntutan yang tidak boleh dibatalkan. Tribunal tersebut telah memeriksa perkataan-perkataan jaminan yang dipersoalkan (lihat perenggan 38).]

Notes

For cases on banker's guarantee see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4556–4562.

For cases on juridiction of court, see 1(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1412–1426.

Cases referred to

Champsey Bhara & Co v Jivraj Balloo Spinning and Weaving Co [1923] AC 480, PC (refd)

Fulcrum Capital Sdn Bhd v Dato' Samsudin Abu Hassan & others [2008] MLJU 744; [2002] 8 CLJ 295, HC (refd)

Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481; [1999] 2 CLJ 788, CA (refd)

Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401; [2004] 1 CLJ 743, FC (refd)

Majlis Amanah Rakyat v Kausar Corporation Sdn Bhd [2009] MLJU 1697; [2009] 1 LNS 1766, HC (refd)

Malaysian Assurance Alliance Bhd v Yearn Sai Ming [1996] 5 MLJ 345, HC (refd)

Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd [2007] 4 MLJ 113; [2007] 3 CLJ 185, CA (refd)

Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd [2000] 3 NZLR 38, PC (refd)

Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210; [1969] 1 LNS 172 (refd)

Legislation referred to

Arbitration Act 2005 ss 35, 42, 50
Contracts Act 1950 ss 77, 79
Rules of the High Court 1980 O 7, O 28

Robert Lazar (Mark Lau with him) (Sreenevasan Young) for the plaintiff/appellant.

Thayan Kugan (Farah Naz Kumar with her) (Md Tajuddin & Co) for the defendant/respondent.

Hasnah Mohammed Hashim J:

ENCLOSURE 1

[1] The plaintiff seeks the determination of this court on the following questions of law arising out of the final award published by the learned arbitrators Tan Sri Dato' Seri Siti Norma Yaakob, Dato' Cecil Abraham and Encik Mohamed Ismail Shariff (collectively 'the arbitral tribunal'), on 30 September 2011 pursuant to ss 42 and 50 of the Arbitration Act 2005, and O 7 and 28 of the Rules of the High Court 1980, as follows:

(a) whether the amount guaranteed in an ondemand performance guarantee is payable upon the making of a written demand without restriction or condition or proof of any default by the principal and notwithstanding any objection by the principal?;

(b) whether it is ss 77 or 79 of the Contracts Act 1950 that applies to ondemand performance guarantees?; and

(c) whether a guarantor's liability for an ondemand performance guarantee arose upon the making of first demand on the guarantor or only upon proof of default by the principal?

and for an order:

(i) that as a consequence of the determination of questions (a) and/or (b) and/or (c) above, the final award be varied such that the plaintiff's claim in the arbitration is allowed in that the plaintiff is awarded RM16,000,000 being the guaranteed amount provided by the bank guarantee and 3% interest on RM16,000,000 calculated from 15 January 2008 until the date of this order and a further 8% interest on RM16,000,000 calculated from the date of this order until the date of full payment by the defendant and that the plaintiff is awarded all the costs of the arbitration including legal costs on a complete indemnity basis or on any other basis as this honourable court considers appropriate;

(ii) that the costs of and incidental to this application be borne by the defendant; and

(iii) that such further or other relief be given as deemed fit and proper by this honorable court.

BACKGROUND

[2] The plaintiff is engaged in the business of providing specialised off-shore services to the oil and gas industry. The defendant is a financial institution registered under the Islamic Banking Act 1983. The subject matter of the arbitration is a bank guarantee dated 11 December 2007 in the sum of RM16,000,000 ('guaranteed amount') provided by the defendant. Under the bank guarantee the defendant was the guarantor to which Intraline Resources Sdn Bhd ('Intraline') was the principal. The plaintiff was engaged by Intraline by a subcontract dated 12 November 2007 to provide off-shore services in relation to the provision of transportation and off-shore installation of Bel-A Topside and conductors ('the project').

[3] The plaintiff had on 3 December 2007 issued a tax invoice to Intraline for payment. The said tax invoice is pursuant to cl 4.3 of the subcontractor due within 30 days of the receipt of the invoice. The plaintiff on 24 December 2007 by a 14 days' notice written demand to the defendant demanded payment of the guaranteed amount which it contended was due to the defendant due to Intraline default pursuant to the bank guarantee. The defendant however declined to make any payment stating that it was not due under the bank guarantee.

[4] The principal contention of the plaintiff is that as the bank guarantee is an on-demand guarantee then the defendant is liable to make the payment of RM16,000,000 together with interest when Intraline failed to pay. The plaintiff's application is brought under s 42 of the Arbitration Act 2005, following an arbitration that commenced between the plaintiff and the defendant ('the arbitration'). The arbitration concerned a dispute between the plaintiff and the defendant in respect of the bank guarantee.

[5] The arbitration culminated in the final award which was published on 30 September 2011. The arbitral tribunal dismissed the plaintiff's claim with costs awarded to the defendant. This final award was subsequently corrected under s 35 of the Arbitration Act 2005 due to a miscalculation of costs, but the grounds and the decision remained the same.

[6] It is the plaintiff's contention that the arbitral tribunal in arriving at its decision had made errors of law which were apparent on the face of the final award. The plaintiff then proceeded to file this application under s 42 of the Arbitration Act 2005 to refer question of law arising out of the said final award.

SECTION 42 OF THE ARBITRATION ACT 2005

[7] Section 42 of the Act provides as follows:

(1) Any party may refer to the High Court any question of law arising out of an award.

(1A) The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties.

(2) A reference shall be filed within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is sought.

(3) The High Court may order the arbitral tribunal to state the reasons for its award where the award —

(a) does not contain the arbitral tribunal's reasons; or

(b) does not set out the arbitral tribunal's reasons in sufficient detail.

(4) The High Court may, on the determination of a reference —

(a) confirm the award;

(b) vary the award;

(c) remit the award in whole or in part, together with the High Court's determination on the question of law to the arbitral tribunal for reconsideration; or

(d) set aside the award, in whole or in part.

A THE LAW

[8] Malaysian cases have generally applied the applicable rules as stated in *Halsbury's Laws of England*:

B

> where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the Arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the Arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

C

[9] The Federal Court in *Intelek Timur Sdn Bhd v Future Heritage* [2004] 1 MLJ 401; [2004] 1 CLJ 743, regarded it as 'well settled' law that an arbitration award is final, binding and conclusive and can only be challenged in exceptional circumstances.

D

[10] Gopal Sri Ram JCA (as His Lordship then was) in *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113; [2007] 3 CLJ 185, observed that the High Court does not enjoy appellate jurisdiction. A court when examining the objections taken to an award made by an arbitrator is not required to examine the correctness of the claim on merits. The court cannot sit in appeal over the views of the arbitrator by reexamining and reassessing the materials.

E

F

[11] In *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481; [1999] 2 CLJ 788, Gopal Sri Ram JCA, emphasised that 'the jurisdiction to set aside or remit an arbitrator's award whether at common law or under statute is one that should be exercised with great care and a proper sense of responsibility'.

G

[12] Therefore the lack of appraisal of the law and the evidence is not per se a good ground to set aside or remit for reconsideration by the arbitral tribunal. There must be a 'serious failure' to analyse and appraise 'material' and 'relevant' evidence. In *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210; [1969] 1 LNS 172 it was held:

H

I

> … failure to analyse, and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated.

[13] The general principle to be applied as stated in *Sharikat Pemborong* is as follows:

> … this is not a re-hearing … I am not satisfied that the arbitrator had drawn wrong inferences of fact from the evidence. Even if he did, that by itself is not sufficient as a ground to warrant setting aside the award. It would be contrary to all established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been 'misapprehended and misunderstood'.

[14] In *Intelek Timur* Siti Norma FCJ reiterated the governing principles as propounded by Raja Azlan Shah J in *Sharikat Pemborong*:

> The law regarding the effect of an arbitration's award is well settled in that the award is final, binding and conclusive and can only be challenged in exceptional circumstances. As such if an arbitrator had erred by drawing wrong inferences of fact from the evidence before him be it oral or documentary that in itself is not sufficient for the setting aside of his award. 'It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been 'misapprehended and misunderstood' per Raja Azlan Shah J (as he then was) in *Sharikat Pemborong Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210; [1969] 1 LNS 172 (at p 407).

[15] The Court of Appeal in *Hartela* through the judgment of Gopal Sri Ram JCA (as His Lordship was then) said that the award of the arbitrator is final, binding and conclusive and may not be challenged merely on the ground that it is erroneous:

> The general rule at common law is that, absent a contrary intention in the agreement to arbitrate entered into between the parties to a controversy, the award of an arbitrator is final, binding and conclusive. It may not be challenged merely on the ground that it is erroneous. As Shah J, said in *Union of India v Rallia Ram* AIR 1963 SC 1685, at p 1691:
>
> > An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenged on the ground that it is erroneous … The court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or willful deception … The award of the arbitrator is ordinarily final and conclusive, unless, a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the civil courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement.

[16] Justice Mohamad Ariff Md Yusuf (HCJ) in *Majlis Amanah Rakyat v*

Kausar Corporation Sdn Bhd [2009] MLJU 1697; [2009] 1 LNS 1766 eloquently explained the application of s 42 of the Arbitration Act:

> … the emphasis on the words 'arising out of an award' is pertinent one. A question of law must arise out of an award, and not out of the arbitration. As such, the jurisdiction conferred on the court should be limited one, more in line with the jurisprudence on error of law on the face of the award. This is a view urged upon this court by the defendant's counsel, who, through his industry, has systematically analysed the development of the law in Malaysia in that regard. To summarise the position taken by the defendant, counsel argues the common law remedy of 'error of law on the face of the award' is 'entrenched' in the Malaysian legal jurisprudence, and it is a well-established principle of construction that the statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that unmistakably point to the conclusion. Counsel impressed upon me how the common law has incorporated this jurisprudence since 1841 (following the decision in *re Hall and Hinds*) through other leading decisions in 1843, 1845, 1846 1849, 1857 (citing the cases of *Phillips v Evans*, *Hagger v Baker*, *Fuller v Fenwick*, *Hutchinson v Shepperton and Others*, *Hutchinson v Fernie*) until the present with the passing of the English Arbitration Act 1996. Turning to the development in Malaysia, counsel cited the early case of *Government of Kelantan v Duff Development Company Limited* [1932] AC 395 (Privy Council) which expressly incorporated the law on 'error of law on the face of the award', down to the celebrated decision in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210; [1969] 1 LNS 172, …
>
> I must say this line of argument by the defendant is very convincing and has clear support by way of principle and authority. I share the view the jurisprudence on 'error of law on the face of the award' is very well entrenched in Malaysian law such that any attempt to have it displaced must accordingly find strong statutory support and rationale. As indicated earlier in this judgment, the Malaysian statutory provision, unlike the UK provision, does not expressly exclude the application of 'error of law on the face of the award'. It will be therefore consistent with principle and authority, and consistent as well with established principles of statutory interpretation, for this court to agree with the view taken by the defendant. Further, I have taken note of the New Zealand equivalent statutory provisions and their subsequent amendments, such that it will only be fair to conclude that short of an express statutory amendment, it will be too drastic and unwise for this court to adopt the position taken by the plaintiff. Briefly put, the established law and current statutory provision cannot simply allow the court to reverse the entire jurisprudence on 'error of law on the face of the award'. It may be that over time and through the gradual interpretative process reflective of the common law method and tradition, the technical rigours of this particular law (such as the need, for instance, of having to locate a clear proposition of law on which the award depends evident in the award itself) might in particular cases be loosened, but to say this cannot be the same as saying s 42 of the Arbitration Act 2005 allows the court the leeway suggested by the plaintiff.

[17] Justice Ariff also quoted a passage by Lord Mustill in the case of *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd* [2000] 3 NZLR 38 where His Lordship said:

> Arbitration is a contractual method of resolving disputes. By their contractor parties agreed to entrust the differences between them to the decision of an arbitrator or panel of Arbitrators, to the exclusion of the courts, and they bind themselves to accept that decision, once made, whether or not they think it right. In prospect, this method often seems attractive. In retrospect, this is not always so. Having agreed at the outset to take his disputes away from the court the losing party may afterwards be tempted to think better of it, and ask the court to interfere because the arbitrator has misunderstood the issues, believed unconvincing witness, decided against the weight of evidence, or otherwise arrived at a wrong conclusion. All develop systems of arbitration law have in principle set the face against accommodating such a change of mind. The parties have made the choice, and must abide by it. This general principle is, however, applied in different ways under different systems, according to the nature of the complaint.

[18] Therefore any decision to vary set aside, remit or refuse to enforce and register the award must only be exercised sparingly and in very exceptional circumstances. It is trite that the court will not ordinarily interfere with the decision of an arbitrator unless it is a case of patent injustice which the law permits the court in clear terms to interfere the arbitrators had in the award considered the issues complained of.

[19] In the case of *Champsey Bhara & Co v Jivraj Balloo Spinning and Weaving Co* [1923] AC 480 the Privy Council described an error of law in the face of the award as:

> … that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous (per Lord Dunedin).

[20] One underlying principle established in these cases is that an arbitral tribunal should be regarded as the master of the facts and of the procedure to be applied.

[21] Guided by the above mentioned principles I considered the questions of law referred to this court pursuant to s 42 of the Act.

A

ISSUES FOR DETERMINATION

Whether the amount guaranteed in an on-demand performance guarantee is payable upon the making of a written demand without restriction or condition or poor of any default by the principal and notwithstanding any objection by the principal

B

[22] The bank guarantee provides:

C

> We hereby irrevocably guarantee payment to SWIBER if IRSB fail to effect payment wholly or partially within the time stipulated in the Contract and we guarantee to make such payment within 14 working days upon receipt of your written demand and shall be conclusive evidence that the sums claimed are due to you under this Guarantee.

D

> We shall make payment on first demand without restriction or condition and notwithstanding any objection by IRSB. We shall not require SWIBER to justify the breach indicated in its demand for payment.

E

[23] The arbitral tribunal at para 86 of the final award had held that whether a bank guarantee is an on demand or a conditional guarantee is a matter of construction. In para 87 of the said final award the tribunal states:

F

> The arbitral tribunal is therefore of the view that the bank guarantee is an on demand guarantee as it states quit clearly that the obligation of the respondent is to irrevocably guarantee payment within the time stipulated in the contract and it is to be made within 14 working days upon receipt of the written demand. This interpretation is consistent with the decision of the Federal Court in *China Airlines* and *LEC contractors*.

G

[24] The amount guaranteed in an on-demand performance guarantee is payable upon the making of a written demand without restriction or condition or poor of any default by the principal and notwithstanding any objection by the principal.

H

[25] With regards to the issue when did the cause of action arose the tribunal in the final award explained:

I

> The claimant sent an invoice to Intraline on 3 December 2007 in the sum of US$4,817,417 which required payment within 30 days of receipt of the invoice. This is disputed. There is a letter dated 11 December 2008 from Intraline to the Defendant in which it states that the invoice was received on 26 December 2007. There is also a further letter from Intraline dated 8 December 2008 in which it states as follows:

> … we agree to accept and take into our books your invoice SM/ V-70034 dated 3 December 2007 received on 18 December 2007 for the sum of US$4,817,417.00 …

> … The arbitral tribunal accepts that the letter of 8 December 2008 from Intraline is explicit in that it has clearly stated that it would agree to accept and take into its books the invoice dated 3 December 2007 as having been received on 18 December 2007.
>
> The arbitral tribunal therefore holds that the demand of the claimant was received by Intraline on 18 December 2007.

[26] Turning to the issue of the validity of the demand dated 24 December 2007 the tribunal stated as follows:

> The date of the receipt which the arbitral tribunal accepts is 18 December 2007 in which case, the tax invoice would be due on 30 days from 18 December 2007 which is 17 January 2008. The respondent received the demand on 24 December 2007 and it is therefore the tribunal's view that the demand is premature.

[27] The arbitral tribunal had thoroughly deliberated and determined based on evidence presented before them as to whether the demand on the bank guarantee is valid ie premature and whether there was a cause of action accrued against the defendant at 24 December 2007, the date when the demand on bank guarantee was made by the plaintiff.

[28] The arbitral tribunal had also considered and reviewed the plaintiffs as well as the defendant's version and decided to accept the defendant's version. In arriving to its finding the arbitral tribunal had also examined the provision of cl 14.1 of the subcontract to determine whether the said provisions of that clause shortens the period for payment by the bank. Clause 14.1 of the subcontract provides as follows:

> 14.1 Payment Guarantee
>
> CONTRACTOR shall furnish SUBCONTRACTOR with a confirmed, irrevocable and unconditional first call Bank Guarantee or Letter of Credit for the Subcontractor Work within seven (7) days of signing of subcontractor agreement or prior to the mobilisation of the Vessel, whichever is earlier. The Bank Guarantee or Letter of Credit shall be as per format given in Exhibit F.
>
> This Bank Guarantee or Letter of Credit shall remain valid until 31st December 2007. The Guarantee or Letter of Credit amount shall be for Ringgit Malaysia Sixteen Million only (RM 16,000.00). In the event that Subcontract Works gets extended beyond five (5) days due to weather or other CONTRACTOR caused delays, CONTRACTOR shall increase the Bank Guarantee or Letter of Credit amount with the equivalent number of extended day rate, to be agreed by SUBCONTRACTOR, sufficient to cover all the amounts payable by

> CONTRACTOR to SUBCONTRACTOR for the delays already cause, failing which the CONTRACTOR shall make payment, within five (5) days, of sums invoiced by the SUBCONTRACTOR to ensure that the total amounts of outstanding payments due shall not exceed the Bank Guarantee or Letter of Credit amount. This process shall be repeated for each succeeding period of extension due to these delays or the CONTRACTOR and the SUBCONTRACTOR shall mutually agree on other mode of payment security.

[29] The tribunal came to the conclusion that the increase in the bank guarantee only arises when the subcontract works are delayed beyond five days from the original time. In its final award the arbitral tribunal states:

> 95. The Bank Guarantee has to be increased in the equivalent number of extended day rate sufficient to cover all payments payable by Intraline to Swiberfor the delays already caused due to weathered conditions and not for the subcontract work already covered in the subcontract and Bank Guarantee.
>
> 96. The payment of the Invoice within five (5) days is only applicable if Intraline fails to increase the Bank Guarantee and the time period of (5) days are only for delayed subcontract works.

[30] The tribunal is of the view that cl 14.1 does not apply as there is no evidence that the subcontract works were in fact delayed. The weather reports submitted by the plaintiff are not conclusive as to whether the subcontract Works were delayed beyond the five days from the original time due to the weather conditions. There was also no request for the bank guarantee to be increased.

[31] I am of the view that the arbitral tribunal had made a finding of fact based on evidence presented that a cause of action on the tax invoice had not arisen when the demand on the bank guarantee was made on 24 December 2007.

[32] The arbitral tribunal had applied the correct legal principles relating to an on-demand guarantee based on case law and construction of the wordings of the relevant clauses in the bank guarantee. This is a finding of fact based on evidence before the arbitral tribunal and this court shall not interfere on grounds it would had come to a different conclusion. There is no error on the face of the award on this question of law.

Whether it is ss 77 or 79 of the Contracts Act 1950 that applies to on-demand performance guarantees?

[33] Section 77 of the Contracts Act provides:

A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a 'contract of indemnity'.

[34] Section 79 of the Contracts Act 1950 defines a contract of guarantee as:

… a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of which default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

[35] The plaintiff relied on the decision of *Malaysian Assurance Alliance Bhd v Yearn Sai Ming* [1996] 5 MLJ 345. In his judgment KL Rekraj JC (as he then was) said:

A performance guarantee (performance bond) is a stringent form of contract of indemnity as provided for under s 77 of the Contracts Act 1950 ('the Act') which reads:

> A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person is called a 'contract of indemnity'.

They are not contracts of guarantee under s 79 of the Act which requires strict construction, so that no liability is imposed on the surety which is not clearly covered by the terms of the guarantee.

[36] The defendant was however of the view that s 79 of the Act applies and relied on *Fulcrum Capital Sdn Bhd v Dato' Samsudin Abu Hassan & others* [2008] MLJU 744; [2002] 8 CLJ 295 where His Lordship Justice Malik Ishak HCJ (as he then was) said in his judgment:

Section 79 of the Contract Act 1950 defines a 'contract of guarantee' as 'a contract to perform the promise, or discharge the liability, of a third person in case of his default.' The person who gives the guarantee is called the 'surety' or 'guarantor', while the person in respect of which default the guarantee is given is called the 'principal debtor'. And the person to whom the guarantee is extended to is called the 'creditor'. In plain simple language, a guarantee is a promise by the guarantor to answer for the default of the principal debtor to the creditor.

[37] The tribunal having considered the submissions of the parties is of the view that s 79 of the Act would be applicable and the liability for payment would only arise in the event of default and that the default must be on the part of the principal debtor. The finding of the arbitral tribunal that s 79 of the

aforesaid Act applies is consistent and not in contradiction with the evidence presented. Furthermore the misapplication of law (if at all) or favoring one version to another is not an error on the face of award.

Whether a guarantor's liability for an on-demand performance guarantee arose upon the making of first demand on the guarantor or only upon proof of default by the principal?

[38] The arbitral tribunal had deliberated and decided based on the contemporaneous documents evidence before them that the bank guarantee is an irrevocable demand guarantee. The tribunal had examined the words of the bank guarantee in question.

CONCLUSION

[39] On the facts of this case and the records as well as the authorities cited by learned counsel I find that the arbitral tribunal has considered the arguments of the parties in relation to the three questions above.

[40] This is a finding of fact based on evidence before the arbitral tribunal and the court should not interfere on grounds it would come to a different conclusion or that the finding of the arbitral tribunal on a question of law is erroneous. The arbitral tribunal had deliberated and determined based on evidence presented before them as to whether the demand on the bank guarantee is premature and whether there was a cause of action accrued.

[41] The High Court has a limited jurisdiction to intervene. Lack of appraisal of the law and the evidence are not per se a good ground to vary, for reconsideration by the arbitral tribunal. There must to be a serious failure to analyse and appraise material and relevant evidence. Further, I am mindful of the principle that this limited jurisdiction should be exercised only in 'exceptional circumstances' and should be confined to arbitral errors and not appellate errors. The court should not concern itself with the mere merits or correctness of the arbitrator's decision. Justice Ariff in the *Kausar*'s case explained the role of the court:

> Bearing in mind the comparative jurisprudence and the excellent statement of the *Law and Practice of Commercial Arbitration* by the authors of Redfern, Hunter, Blackaby & Partasides, *Law and Practice of International Commercial Arbitration*, which I have extensively quoted above, it will be unwise for any Malaysian court to conclude in favour of an extended jurisdiction under s 42 of our Arbitration Act 2005, even for domestic arbitral awards, as urged by counsel for the plaintiff. That the courts in Malaysia should take a limited view of its jurisdiction under s 42 also finds support in the views expressed by the learned authors of Sundra Rajoo & Davidson, *The Arbitration Act 2005 (2007)* who are of the view that a 'strict

approach' should be applied by Malaysian courts, and the fact that the Malaysian Act has omitted the leave requirement makes it all the more necessary for a strict approach to be adopted. See paras 42.10–42.11, p 201 of this commentary:

> The scope of the words 'arising out of an award' in the English 1979 Act was discussed at length in the English Court of appeal case of *Universal Petroleum Co v Handels und Transport GmbH* [1987] 1 WLR 1178, counsel for the appellant argued that a wide scope should be given to these words …

… What needs to be emphasised as pointed out Kerr LJ is that the question of law must arise out of the award itself and not out of the arbitration. Whether or not the test is identical, it certainly does not defer much from the old test which apply to 'errors on the face of the award'. Viewed in this light, there should be no danger of 'opening the floodgates' to peripheral issues arising in the case of the arbitration but not on the award. We are of the view that the strict approach adopted in Universal Petroleum should be applied to the Malaysian courts since the words of the statute of the same. The fact that the Malaysian Act has omitted relief requirements makes it all the more necessary for a strict approach to be adopted.

The Federal Court in *The Government of India v Cairn Energy India Pty Ltd & Anor* [2012] 3 CLJ 423 said that:

> where a specific matter is referred to arbitration for consideration, it ought to be respected in that 'no such interference is possible upon the ground that the decision upon the question of law is an erroneous one.

[42] Based on the reasons and principles mentioned above I am satisfied that arbitral tribunal had considered the questions of law accordingly. There is no evidence of any error of law and therefore under the circumstances there is no reason to vary or set aside the final award. Accordingly encl 1 is dismissed with cost.

Enclosure 1 dismissed with costs.

Reported by Ibnu Aswan